2010 WL 3591731 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
San Jose Division

Robert MARSILI, Plaintiff,

v.

THE UNITED STATES OF AMERICA, et. al., Defendant.

No. C 10-1164 JW.
August 17, 2010.

Defendant's Motion for Summary Judgment

Melinda Haag (CSBN 132612), United States Attorney, Joann M. Swanson (CSBN 88143), Chief, Civil Division, James A. Scharf (CSBN 152171), Assistant United States Attorney, 150 Almaden Blvd., Suite 900, San Jose, CA 95113, Telephone: 408-535-5044, Fax: 408-535-5081, Attorneys for Defendant.

Judge: Hon. James Ware.

Date: January 10, 2010

Time: 9:00 a.m.

Courtroom: 8, 4th Floor

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NOTICE OF MOTION

PLEASE TAKE NOTICE that defendant United States of America will move this Court on January 10, 2010, at 9:00 a.m. in Courtroom 8, 4th Floor, United States Federal Building, 280 South 1st Street, San Jose, California, before the Honorable James Ware, United States District Court Judge, for an order granting summary judgment in favor of defendant and against plaintiff Robert Marsili. The motion is brought pursuant to Fed. R. Civ. P. 56 [1] and is based on this notice, the memorandum of points and authorities, the declarations of Barry Gardiner, M.D. and James A. Scharf, and the exhibits thereto, and all the matters of record filed with the Court, and such other evidence as may be submitted.

STATEMENT OF RELIEF

Defendant United States of America moves for an order granting summary judgment in favor of the United States of America and against plaintiff Robert Marsili.

ISSUES TO BE DECIDED

1. Whether summary judgment should be granted in favor of defendant and against plaintiff on plaintiff's medical malpractice claim.

2. Whether summary judgment should be granted in favor of defendant and against plaintiff on plaintiff's **elder** **abuse** claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this lawsuit, plaintiff brings two claims against defendant under the Federal Tort Claims Act (FTCA), which waives the sovereign immunity of the United States [2] for certain torts committed by government employees where a claim would exist under state law if the government were a private party. 28 U.S.C. § 1346. The first claim is for medical malpractice. “It has to be human error for it to happen,” Mr. Robert Marsili (plaintiff) testified when asked if he understood that things sometimes go

wrong in surgeries. Marsili Dep. 77:17-18.[3] Not believing in inherent risks of surgical procedures, plaintiff has brought this suit for a "botched" hernia repair based on the mere existence of an unfortunate consequence of the procedure, one which is a known and inherent risk of all hernia repair surgeries. Despite signing an informed consent form explicitly listing the risk of loss of testicle, plaintiff now claims that the Veterans Administration (VA) Hospital in Palo Alto must have acted outside the standard of care.

The second claim is for **elder abuse**. Disagreement with the VA over amounts due and benefit coverage has led the plaintiff to file an **elder abuse** claim in this Court, even while he presently litigates before an administrative law judge. Plaintiff asks for special damages under the **Elder Abuse** and Dependent Adult Civil Protection Act, claiming that the VA, in performing the hernia repair surgery and billing him for co-payments over the past few years that he feels he does not owe, has neglected and financially **abused** him.

Defendant asks this Court to grant its Motion for Summary because plaintiff's medical malpractice and **elder abuse** claims are factually unsupported. Further, this Court lacks jurisdiction over the **elder abuse** claim, as plaintiff has not yet exhausted his administrative remedies.

II. STATEMENT OF FACTS

Seventy-nine year old plaintiff began receiving care at the VA in Palo Alto around 2001. Marsili Dep. 126:24. Prior to the incident which is the subject of this lawsuit, plaintiff has been generally satisfied with the care that he has received. *Id*. at 127:12-22.

A. Plaintiff's Hernia Repair Surgery

In December 2008, plaintiff complained of increasing pain from a left hernia to his primary physician, Dr. Thrailkill. Ex. G.[4] Because plaintiff had previously experienced a hernia on the right side, which had been surgically repaired years back at a different hospital, he was familiar with the pain and its origin. Marsili Dep. 78:17-24. Plaintiff and Dr. Thrailkill discussed surgically repairing the hernia. *Id*. at 48:1-21. On the morning of January 22, 2009, plaintiff visited the VA for a consult at the General Surgery Clinic.[5] Ex. H. Plaintiff was seen by surgical resident Robert Oakes, M.D., and supervising physician Danagra G. Ikossi, M.D. *Id*. At this visit, plaintiff electronically signed a Consent for Treatment/Procedure form, a document outlining the procedure and its accompanying risks and benefits. Ex. I. Plaintiff's signature on this form represented that "someone has explained this treatment/procedure and what it is for," that "someone has explained how this treatment/procedure could help [him], and things that could go wrong," and that "[plaintiff had] been offered the opportunity to read the consent form." *Id*. at p. 5. The form was also signed Dr. Oakes and Nina Bellatorre, a witness. *Id*. at p. 6. Plaintiff does not recall whether or not he signed this form and speculates that the VA falsified this document because his electronic signature is smaller than his actual signature. Marsili Dep. 17:1-10; 50:9-25.

Included in this form, under the section labeled "What are the known risks of this treatment/procedure?" was the risk of "[i]njury to and/or loss of testicle(s) or spermatic cord(s), causing sterility." *Id*. at p. 2. While loss of testicle is a small risk of a hernia repair surgery, it is also an inherent risk, and the chance of loss of testicle might increase depending on various factors. In this case, plaintiff's obesity and large hernia increased the difficulty of surgery, thereby increasing the risk of compromise to the blood flow of the testicle. Declaration of Barry Gardiner, M.D. ("Gardiner Decl.") ¶8.

Three weeks later, on February 17, 2009, Dan Eisenberg, M.D., performed an open repair surgery of plaintiff's hernia. Ex. J. According to Dr. Eisenberg's surgical notes, the surgery went without incident. *Id*. Dr. Eisenberg noted that the hernia was very

large, covering almost the entire floor of the inguinal canal. *Id*. To repair the hernia, Dr. Eisenberg had to dissect the hernia sac off of the spermatic cord, as well as dissect the vas deferns off a large cord lipoma. *Id*.

Plaintiff's post-operative recovery was charted in the ambulatory recovery record. Ex. K. Every half hour, a nurse measured plaintiff's temperature, pulse, respiration, blood pressure, and pain. Plaintiff's respiratory and pulse levels had increased somewhat since he first woke up from the surgery, but are "vague" indicators of pain that were not alarmingly high. Threatt Dep. 74:16. [6] The nurse also measured motor, consciousness, circulation, respiration, and color, the five factors that compose the scope of the discharge criteria. Ex. K.

At 7:30 pm, plaintiff reported a subjective pain level of "7/10" on the ambulatory recovery record, which describes moderate pain as anywhere from a 5-7. *Id*. At 7:55 pm, he was given Vicodin. Ex. L. At 8 pm, plaintiff signed the nursing discharge summary, which indicated that he had no pain. Marsili Dep. 87:3-8. [7]

The VA has a system whereby each discharge criteria factor is measured by a 1, 2, or 3. If a patient has a score of 15 and has stable vital signs, then the patient can be discharged without an order from a medical doctor. Threatt Dep. 69:4-8. Plaintiff had a score of 15 at the time the nurse discharged him from the VA. *Id*.

Plaintiff was discharged around 8 pm with a prescription for additional pain medication and appropriate post-operative care instructions. Exs K, L & M. Plaintiff was wheeled from the hospital to his car in a wheelchair, a standard practice following this outpatient procedure. Ex. K; Threatt Dep. 93:16-20.

B. Plaintiff's Orchiectomy

Over the next three days, plaintiff's pain significantly increased and his overall condition deteriorated. After his discharge, he developed a fever, and his left testicle swelled to about twice its normal size. Marsili Dep. 93:10-94:18. During those three days he did not call the VA (*Id*. at 87:12-19), but on February 20, 2009, the acute pain led plaintiff to call an ambulance to take him to the hospital. *Id*. The paramedics came to his house. Before leaving, they called the VA emergency room to alert the hospital that a patient would be arriving. Marsili Dep. 96:10-17. The VA, however, was on "diversion" status due to overcapacity. Ex. N. The Status Detail report shows that for various windows throughout the day and for a total of almost eight hours, the VA was diverting all ambulances because there were "no inpatient beds." *Id*.

Because the VA was on "diversion" status, the ambulance took plaintiff to Sequoia Hospital, where plaintiff was admitted at 18:23. Ex. O. After an emergency room consult and an ultrasound which showed no blood flow to the left testicle, Chris Threatt, M.D. was called in to examine plaintiff for the possibility of surgery. ThreattDep. 18:18-19:13. Dr. Threatt performed a scrotal exploration which resulted in a left orchiectomy, or the removal of plaintiff's infarcted left testicle. *Id*. at 23:18-19.

The testicle removal went without complication. Plaintiff returned to Dr. Threatt on March 6, 2009 for a follow-up visit, where Dr. Threatt confirmed that everything was healing well. *Id*. at 40:5-41:24. At this point, Dr. Threatt told plaintiff that he could resume normal activities of daily living. *Id*. Later the same year, in November 2009, plaintiff had a routine visit at the VA with his primary physician. Dr. Thrailkill reported that "the patient has no pain today," and that the "patient has been doing fine since" the testicle removal. Ex. P.

In March 2010, plaintiff visited Dr. John OHolleran, M.D., because of apparent "chronic pain in the left groin" since the time of the orchiectomy. Ex. Q. Dr. OHolleran found "no evidence of recurrent hernias" or "nerve damage" and reported that plaintiff's complaint of a "pressure sensation" on his thigh is most likely a result of "scarring following the hernia repair and orchiectomy." *Id*. Plaintiff has sought no other treatment. Marsili Dep. 121:19-21.

C. Co-Payment Dispute

Separate from the hernia repair surgery, plaintiff also believes that the VA has been wrongfully over-charging him for co-pays for the last three years, resulting in deductions-estimated by plaintiff between $1000 and $2000-from his Social Security checks. Marsili Dep. 143:6-144:10. In 2007, the Department of the Treasury sent a letter to plaintiff explaining that they were about to start deducting from his Social Security checks over amounts due to the VA. Ex. S. Plaintiff is currently litigating this dispute before an administrative law judge. *Id*. at 145:4-13.

D. Eligibility Dispute

In response to plaintiff's claim for disability benefits brought under 38 U.S.C. § 1151, the VA mistakenly stated that it believed plaintiff to be ineligible for benefits. However, the VA never denied plaintiff any medical treatment because of that mistake. Marsili Dep. 137:10-13. It appears that the VA had mistakenly entered the wrong dates of service for plaintiff, which affected his eligibility. Ex. R. Upon discovery of this administrative error, the VA promptly corrected the dates of service and advised plaintiff that he was indeed eligible for health care benefits. *Id*. Despite learning that this issue had been resolved, plaintiff has not taken any further steps to pursue an administrative Section 1151 claim for disability benefits.

E. Administrative Tort Claim

In February 2010, plaintiff filed an administrative tort claim with the VA for "negligently perform[ing] a botched hernia surgery." The administrative claim made no further allegations, and was denied. Ex. C.

F. Complaint

In April 2010, plaintiff served the United States with the present lawsuit. The complaint lists two causes of action under the FTCA: medical malpractice and **elder abuse**. *See* Complaint ("Compl."). This was the first time plaintiff alluded to **elder abuse**, a claim brought under the **Elder Abuse** and Dependent Adult Civil Protection Act ("the Act"), Welfare and Institutions Code § 15600 *et seq.*, for "neglect" and "financial **abuse**" of an **elder**. While plaintiff's claim of **elder abuse** is not developed in the Complaint, one of the apparent claims is that the VA "terminat[ed] Plaintiff's medical coverage in retaliation." *Id*. at ¶16.

G. Plaintiffs Responses to Contention Interrogatories

To flesh out plaintiff's claims, defendant served contention interrogatories, which asked plaintiff to "state all facts which support your contention that defendant United States is liable for plaintiff's damages, including but not limited to all facts which support your contention that Dr. Eisenberg 'botched' your hernia repair surgery. In so doing, please specify with particularity in what way(s) Dr. Eisenberg violated the standard of care as well as all facts which support your claim for **elder abuse**." Ex. D. Plaintiff failed to list any facts in his response. *Id*. In a subsequent "meet and confer," plaintiff confirmed that he was "unable to respond to those interrogatories (requests 21-23) at this time . . .." Ex. E.

H. Plaintiff's Deposition

To avoid the cost, expense, and distraction of filing a motion to compel, defendant went forward with plaintiff's deposition on July 28, 2010, despite the deficiencies in plaintiff's responses to the contention interrogatories. *Id*. Plaintiff clarified during his deposition that he is making five separate claims in this case: 1) the surgery was performed outside the standard of care, and the complication arose because of negligence, 2) he was prematurely discharged from the VA, 3) the VA should have admitted him when he called for an ambulance three days later, 4) the VA engaged in **elder abuse** by improperly determining him as ineligible for a short period of time, and 5) the VA engaged in **elder abuse** by withholding money from his Social Security

checks to pay for an alleged debt due to failure to pay co-pays dating back to 2007.[8] Marsili Dep. 131:2-132:7. This Motion addresses each claim in turn.

I. Dr. Threatt's Deposition

On August 2, 2010, defendant deposed Dr. Threatt, the surgeon who removed plaintiff's testicle at Sequoia Hospital. Dr. Threatt does not work for the VA. Threatt Dep. 100: 13-20. Prior to the deposition, Dr. Threatt reviewed all the relevant medical records, including the VA records. *Id*. at 10:22-11:6. Dr. Threatt opined that Dr. Eisenberg performed the hernia repair surgery within the standard of care. *Id*. at 82:15-20. Although he did not feel the discharge nurse "did as good a job with managing his pain as she should have," he did not testify that infarction was diagnosable at the time of discharge, *id*. at 70:7-12, or that plaintiff's testicle would have been saved had such a diagnosis been made. *Id*. at 83:1-9.

J. Dr. Gardiner's Expert Testimony

Defendant retained expert witness Dr. Barry Gardiner, whose declaration is filed herewith. Dr. Gardiner explained that testicular damage is a small but inherent risk of an open hernia repair surgery, which was magnified in this case because of the size and location of the hernia. Gardiner Decl. ¶¶ 6, 8. Dr. Gardiner opined that Dr. Eisenberg performed a "textbook" hernia repair within the standard of care. *Id*. at ¶9.

Dr. Gardner further opined that the VA did not prematurely discharge plaintiff because plaintiff was sent home when he met the discharge criteria and with the appropriate pain medication and instructions. *Id*. at ¶17. He also testified that plaintiff's testicular infarction could not have been reversed after the surgery if the infarction was a result from injury to the vein or artery, which he believes to be the case. *Id*. at ¶19.

III. LEGAL STANDARDS

With the exception of defendant's argument that plaintiff failed to exhaust his administrative remedies regarding his **elder abuse** claim, this motion is governed by well established summary judgment standards:

A main purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). An issue is "material" if the fact may affect the outcome of the case. *Id*. at 249. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). The party moving for summary judgment has no burden to produce any evidence on elements of a claim on which the non-moving party will bear the burden of trial, but can merely point out an absence of evidence to support any such element. *Celotex*, 477 U.S. at 322-23; *Maffei v. N. Ins. Co. of N.Y.*, 12 F.3d 892, 899 (9th Cir. 1993). Once the moving party points out the absence of evidence, then the non-moving party must come forward with specific evidence to show there is a genuine issue for trial. *Maffei*, 12 F.3d at 899. The moving party is entitled to judgment as a matter of law if the non-moving party fails to make this showing. *Celotex*, 477 U.S. at 323.

Summary judgment is proper not only if plaintiff fails to produce *any* evidence on an element of his case, but summary judgment is also proper if plaintiff fails to produce *sufficient* evidence on an element of his case. The Supreme Court has specifically held that summary judgment is proper against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U. S. at 322.

The mere existence of a "scintilla" of evidence in support of the non-moving party's position is not sufficient. The non-moving party has the burden of establishing sufficient evidence on each element of his case so that the finder of fact could return a verdict for him. *Anderson*, 477 U.S. at 249.

Said summary judgment standards, however, do not govern the issue of whether this Court lacks jurisdiction over plaintiff's **elder abuse** claim because plaintiff failed to exhaust his administrative remedies. That issue is governed by Fed. R. Civ. P. 12(b)(1) standards:

An objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in litigation. Fed. R. Civ. P. 12(b)(1); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Rule 12(h)(3) instructs that a court should dismiss any action over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3); *Arbaugh*, 546 U.S. at 506.

A Rule 12(b)(1) motion can either facially attack the sufficiency of the pleadings to establish federal jurisdiction or factually attack the substance of the jurisdictional allegations. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2005) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In this motion, the United States challenges the Court's subject matter jurisdiction over plaintiffs' claim on factual grounds; accordingly, the applicable standard of review differs greatly from that governing a ruling on a motion for summary judgment. *Thornhill Publ. Co. v. Gen'l Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The Court is presumed to lack subject matter jurisdiction until plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). However, while the plaintiff bears the initial burden of proving subject matter jurisdiction under the FTCA, the United States bears the ultimate burden of proving the applicability of the discretionary function exception. *Terbush v. United States*, 516 F.3d 1125, 1128 (9th Cir. 2008); *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992).

A District Court can hear evidence to resolve factual disputes, if necessary, to determine whether jurisdiction exists. *Inlandboatmens Union of the Pac. v. Dutra Group*, 279 F.3d 1075, 1083 (9th Cir. 2002). "The district court obviously does not **abuse** its discretion by looking to this extra pleading material in deciding the issue [of subject matter jurisdiction] even if it becomes necessary to resolve factual disputes." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). On appeal to a higher court, a District Court's findings of fact must be accepted unless clearly erroneous. *See, e.g., Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Thus, it is error to treat a Rule 12(b)(1) motion as one for summary judgment, or apply summary judgment standards. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996).

IV. ARGUMENT

A. This Court Should Grant Defendant's Motion for Summary Judgement on the Medical Malpractice Claim Because the VA Acted within the Standard of Care

Because plaintiff's hernia surgery was performed in the VA Medical Center in Palo Alto, liability in this case is based on California tort law. The elements of a negligence cause of action under California law are: (1) a duty to use such skill, prudence, and diligence as other members of the relevant profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage. *Hanson v. Grode*, 90 Cal. Rptr. 2d 396, 400 (Ct. App. 1999). In an action for medical negligence, a plaintiff is required to present expert medical testimony to establish the standard of care required of a physician under the circumstances, and to support any claim of breach of that standard of care. *Jackson v. United* States, No. C 05-3006 MHP, No. C 06-6490 MHP, 2007 U.S. Dist. LEXIS 93124, at *5 (N. D. Cal. Dec. 19 2007) (*citing Kelley v. Trunk*, 66 Cal. App. 4th 519, 523 (1998)).

1. Plaintiff was Properly Informed of the Risks of the Hernia Repair Surgery, Including the Specific Risk of Loss of Testicle, and Signed a Written Consent Form Indicating That he had Been Informed of the Risks

Under California law, a physician has a duty to the patient to reasonably disclose, in lay terms, the available choices with respect to the proposed therapy, and to disclose the dangers inherently involved in each. *Cobbs v. Grant*, 502 P.2d 1, 11 (Cal. 1972). The scope of a physician's duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. *Id*. at 11-12.

Assuming that there was a duty to disclose the small but inherent risk of testicular damage, [9] the VA satisfied its duty to disclose. The record in the present case contains a consent form apparently signed by plaintiff, a surgical resident, and a witness, which listed "loss of testicle" as a known risk of the procedure. Ex. I. Dr. Threatt believed this form did "a good job of covering all of the potential complications of a hernia repair." Threatt Dep. 50:12-51:4. Plaintiff does not remember whether or not he signed this form. Marsili Dep. 50:23-51:3. [10]

The VA did not breach their duty to disclose to plaintiff the risks of the surgery. [11] However, even if there was a breach of duty, plaintiff cannot prove causation. To plead an informed consent case, a plaintiff must establish breach of the duty to disclose, and evidence that such breach of duty led directly to the injury about which plaintiff complains. The causal connection arises only if it is established that had revelation been made, consent to treatment would not have been given. *Cobbs*, 502 P.2d at 11-12. [12] To succeed on a negligence claim based on lack of informed consent, the plaintiff is required to prove by a preponderance of the evidence that a prudent person in the plaintiff's position would not have consented to the treatment if he had been properly informed of the risks. *Id*.

There is no evidence in the record that any reasonable person in plaintiff's position would have refused to go forward with the hernia repair surgery had a VA doctor disclosed the small risk of testicular damage, particularly given plaintiff's prior successful hernia repair surgery on his right side. Marsili Dep. 78:17-24. Plaintiff cannot prove that the VA breached its duty, or that a reasonably prudent person would have elected to not undergo the hernia repair had he known of the small risk.

2. Dr. Eisenberg Performed the Hernia Repair Surgery Within the Standard of Care

As Dr. Gardiner testifies, Dr. Eisenberg performed a "textbook" open repair surgery. Gardiner Decl. ¶9. Indeed, this was the same surgical approach that Dr. Threatt would have taken had he been asked to remove this particular hernia. Threatt Dep. 58:19-24. The degree of difficulty of plaintiff's surgery was above average: plaintiff is obese and the hernia was very large. *Id*. at ¶8. Also, plaintiff is a smoker, which makes recovery harder in general. *Id*. But even given the difficulty of the surgery, Dr. Eisenberg still repaired the hernia well. That the blood flow from the spermatic cord to the testicle could at some point be interrupted, thus leading to testicular infarction, is a small but known risk of this surgery, which is why the VA discloses the risk to patients. Despite unfortunate consequences of the surgery, the hernia was repaired, and it was repaired within the standard of care, as confirmed by both Dr. Threatt and Dr. Gardiner.

Based on Dr. Gardiner's expert testimony, there are four different ways damage to the testicle could have occurred during this surgery: from a post-operative haematoma, from injury to the cord resulting from its retraction during the surgery, from dissecting either the vas deferens off the lipoma or the hernia sac off the cord, or from damage resulting from the plug and patch procedure. [13] *Id* at ¶¶10-15. All four of these potential occurrences would have occurred within the standard of care. While damage to the testicle is a small but known risk of a first-time hernia repair surgery, when damage does occur, it is more often than not through no fault. In other words, in the instances when testicular damages occurs, the damage is usually not because of negligence, but because of the inherent risks of this surgery when performed within the standard of care. *Id.*, at ¶11. [14] Dr. Threatt even testified that sometimes a surgeon "may not have a choice but to compromise some of the blood supply in order to completely repair the hernia and remove the sac from the cord." Threatt Dep. 37:11-16. Further, he did not find anything in the pathology report suggesting that the care received at the VA fell below the standard of care. *Id*. at 38:8-11. Dr. Eisenberg did not breach his duty in performing plaintiff's hernia repair.

3. Plaintiff's Post-Operative Care Was Reasonable

Plaintiff was kept at the hospital for the standard amount of time for hernia repair surgeries, which are usually outpatient procedures. Plaintiff signed a discharge summary before leaving at 8 pm, which stated that he was in no pain and had been given proper post-operative instructions. Ex. K. However, even if plaintiff was at a level 7 pain when he left, as reflected in the ambulatory recovery record at 7:30 pm, the VA acted within the standard of care to discharge him, because he met the hospital's discharge criteria. *Id.* Dr. Gardiner testified that the discharge criteria is reasonable and within the standard of care. Gardiner Decl. ¶17. Testicular pain is expected after a hernia repair surgery, and that pain increases as the anaesthesia wears off. It can also be controlled with pain medication, which the plaintiff was prescribed. *Id.;* Threatt Dep. 79:13-24.

Even had Mr. Marsili not been discharged because of his reported pain, it cannot be said to a reasonable degree of medical probability that the testicle would have been saved. To establish causation in personal injury cases, a party must present expert testimony. *Jennings v. Palomar Pomerado Health Sys., Inc.*, 8 Cal. Rptr. 3d 363, 369 (Ct. App. 2003). Plaintiff cannot establish causation for two separate reasons. First, at the time of discharge, there were not sufficient "red flags" to cause a reasonably prudent physician to diagnose testicular infarction. Gardiner Decl. ¶19. [15] Second, even if infarction was suspected, there may not have been enough time to take corrective action. Dr. Threatt testified that a testicle will die between four and six hours after it is deprived of blood. Threatt Dep. 96:18-22. But if the cause of testicular infarction was from an injury to the artery or vein of the cord, as both Dr. Threatt and Dr. Gardiner suspect, then corrective vascular surgery, even micro-surgery, would not have reversed the testicular damage even if it was diagnosed within the four to six hour window of opportunity. *Id.* at 67:15-19; Gardiner Decl. ¶19.

B. This Court Should Grant Defendant's Motion on the Elder Abuse Claim Because This Court Lacks Jurisdiction Over the Claim, and Because the Veteran's Administration Did Not Engage in Elder Abuse

1. The Elder Abuse Statutes and Plaintiff's Claims

The **Elder Abuse** and Dependent Adult Civil Protection Act (hereinafter the Act), Welf. & Inst. Code § 15600 *et seq.* (West 2010), provides for both criminal and private civil enforcement of **elder abuse** and dependent adult **abuse** laws. "[O]ne of the major objectives of [the Act] was the protection of residents of nursing homes and other health care facilities from reckless neglect and various forms of **abuse**." *Delaney v. Baker*, 971 P.2d 986, 994 (Cal. 1999). To state a claim under the Act, a plaintiff (sixty-five years or older) must allege that the defendant subjected an **elder** to statutorily defined **abuse** or neglect. In 1991, the legislature added § 15657 to the Act, providing for enhanced remedies (e.g., attorneys' fees and punitive damages) in addition to all other remedies provided by law when it is shown by clear and convincing evidence that the physical **abuse** or neglect occurred with recklessness, oppression, fraud, or malice. Welf & Inst. Code § 15657. Neither attorneys' fees nor punitive damages are available under the FTCA. 28 U.S.C. § 2674; *see Anderson v. United States*, 127 F. 3d 1190, 1191 (9th Cir. 1997).

Plaintiff's complaint alleges two claims under the **elder abuse** statute. First, he alleges financial **abuse** under § 15610.30, which defines "financial **abuse**" as either "(1) [t]ak[ing], secret[ing], appropriat[ing], or retaining real or personal property of an **elder** or dependent adult to a wrongful use or with intent to defraud, or both; or (2) [a]ssist[ing] in taking, secreting, appropriating, or retaining real or personal property of an **elder** or dependent adult to a wrongful use or with intent to defraud, or both." Welf. & Inst. Code § 15610.30.

Second, plaintiff alleges neglect by the VA Hospital under § 15610.57, which defines "neglect" as the "negligent failure of any person having the care or custody of an **elder** or dependent adult to exercise the degree of care that a reasonable person in a like position would exercise." Welf. & Inst. Code § 15610.57. Moreover, plaintiff alleges that the VA neglected him in the spirit of recklessness, malice, oppression, or fraud. Showing, by clear and convincing evidence, that defendant is guilty of reckless, oppressive, fraudulent, or malicious conduct is a high burden. As the *Delaney* court explained, "the latter three categories involve 'intentional,' 'willful,' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature. 'Recklessness' refers to a subjective

state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur." 971 P.2d at 991 (citations omitted). Presumably plaintiff alleges recklessness in order to access the enhanced remedies of § 15657. [16]

2. This Court Lacks Subject Matter Jurisdiction Over the Elder Abuse Claim Because Plaintiff Failed to Exhaust His Administrative Remedies, and Because the Claim is for a Benefits Dispute, Which Belongs in the United States Court of Appeals for Veterans Claims

a. Plaintiff failed to exhaust his administrative remedies with regards to the elder abuse claim

This Court does not have subject matter jurisdiction over the **elder abuse** claim because plaintiff failed to exhaust his administrative remedies with regards to this claim. A district court has no subject matter jurisdiction over a tort claim brought under the FTCA unless the plaintiff first presents a claim to the appropriate agency, and either the claim is denied in writing, or six months pass without any response from the agency. 28 U.S.C. § 2675(a). The claim requirement is jurisdictional, and thus "must be strictly adhered to," *Jerves v. United States*, 966 F.2d 517, 521 (9th Cir. 1992), particularly because the FTCA waives sovereign immunity and any such waiver must be "strictly construed in favor of the United States." *Id.*

It is generally recognized that Congress had two broad purposes in enacting § 2675(a): to ease court congestion while allowing the government to expedite the fair settlement of meritorious tort claims, and to provide for fair and equitable treatment of private claimants involved in litigation with the government. *See Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir. 1985). Both purposes are served when the claimant gives the agency sufficient notice to conduct the appropriate investigation once he has placed a value on the claim. *Id.* While the Ninth Circuit has additionally concluded that "Congress intended section 2675(a)'s notice requirement... to be minimal," the Ninth Circuit still requires "the bare elements of notice of accident and injury." *Avery v. United States*, 680 F.2d 608, 610 (9th Cir. 1982). Under the *Avery* standard, "where a claimant gives notice of the manner and general circumstances of injury and the harm suffered, and a sum certain representing damages, he has complied with section 2675(a)." *Id.* at 611.

Plaintiff failed to give the VA even minimal notice regarding the **elder abuse** claim. Ex. C. The administrative tort claim only discussed the allegedly negligent medical treatment plaintiff received, and did not mention **elder abuse**. *Id.* The VA did not know until the present lawsuit that plaintiff also felt he had been violated under the California **Elder Abuse** Civil Protection Act. Even by Ninth Circuit standards, plaintiff's administrative remedy has not been exhausted. Thus, plaintiff has not met the jurisdictional requirements for a tort suit against the federal government, and the United States has not waived its sovereign immunity as to plaintiff's allegations regarding **elder abuse**. This Court lacks subject matter jurisdiction and should dismiss plaintiff's claim of **elder abuse**.

b. Plaintiff's claims that money was wrongfully withheld and that coverage was improperly terminated is a dispute over benefits, which does not belong in district court

The second reason this Court lacks subject matter jurisdiction over plaintiff's claim of **elder abuse** is because the claim is essentially a benefits dispute, which falls under the exclusive jurisdiction of the Secretary ("Secretary") of the Department of Veterans Affairs. 38 U.S.C. § 1705. The Secretary has the authority and obligation to prescribe, establish, and operate a system of annual patient enrollment, as well as the authority to establish regulations to implement the statute. *Id.* When a veteran disagrees with the VA's determinations, the veteran must follow an appeals process: the claimant files a notice of disagreement, which is followed by a hearing (if desired) before an agent of the Board of Veterans Appeals. Ultimately, the veteran can appeal to the United States Court of Appeals for Veterans Claims, an Article I court. *Id.*

Plaintiff's claim of **elder abuse** is a dispute over the existence of benefits or the amount due with respect to benefits. This Court thus lacks jurisdiction. Even though plaintiff labels the claim as "**elder abuse**" in his Complaint, the claim is essentially

a benefits dispute. The Ninth Circuit looks beyond labels used by plaintiff in determining whether the conduct upon which the claim is based actually constitutes one of the torts listed in the complaint. *Pauly v. United States Dep't of Agric.*, 348 Fed 1143, 1151 (9th Cir. 2003) (*citing United States v. Neustadt*, 366 U.S. 696, 702 (1961)). The Complaint alleges that "Plaintiff has suffered financial injury and emotional distress and humiliation as a result of Defendant claiming that Plaintiff was never in the United States military and wrongfully withholding excessive amounts of money from Plaintiff's social security check." Compl. ¶16. In other words, plaintiff claims he suffered from the fact that he allegedly did not receive the disability benefits he believed he was entitled to, and he claims he suffered from the fact that money has been withheld from his Social Security checks. He uses the language of the California **elder abuse** statute in an attempt to describe how he was treated by the VA during such benefits disputes, but he does not allege **elder abuse** as defined by Welfare and Institutions Code § 15657, a point discussed further below.

In March 2010, the VA mistakenly determined that plaintiff was not eligible for disability benefits because his discharge was "other than honorable." [17] Ex. R. However, by April 2010, the VA had corrected the dates of service and informed plaintiff that he was in fact eligible for disability benefits. *Id*. Plaintiff is now calling this resolved administrative error "**elder abuse**."

Plaintiff also alleges that the withholding of money from his Social Security checks amounts to **elder abuse**. Compl. ¶16. Under 31 U.S.C. § 3716, the Department of the Treasury can reduce the amount of Social Security benefit payments to pay a debt, a process known as "offset." 31 U.S.C. § 3716. In this case, the Treasury was offsetting plaintiff's checks at the request of the VA because, despite numerous efforts, the VA had not been able to convince plaintiff that he owed a debt from numerous co-payments. Ex. S. Offsetting plaintiff's benefit checks was the end result of the benefits dispute over payment between plaintiff and the VA, which means that it, too, is a dispute falling under the jurisdiction of the Court of Appeals for Veteran's Claims.

3. This Court Should Alternatively Grant Defendant's Motion Because the VA Hospital Did Not Engage in Neglect or Financial Abuse and Did Not Act in Bad Faith

a. The VA did not neglect, or recklessly neglect, plaintiff

Section 15610.57 of the California Welfare and Institutions Code defines "neglect" as the "negligent failure of any person having the care or custody of an **elder** or dependent adult to exercise the degree of care that a reasonable person in a like position would exercise." Welf. & Inst. Code § 15610.57. Neglect refers not to the substandard performance of medical services, but rather to the failure of those responsible for attending to the basic needs of **elderly** adults to carry out their custodial obligations. *Sababin v. Super. Ct.*, 50 Cal. Rptr. 3d 266, 271-72 (App. Dep't Super. Ct. 2006). **Elder abuse** claims are thus based on custodial neglect rather than professional negligence. Neglect within the meaning of the **Elder Abuse** Act

> . . . does not refer to the performance of medical services in a manner inferior to 'the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing,' but rather to the failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults, regardless of their professional standing, to carry our their custodial obligations.

Delaney, 971 P.2d at 993 (citing *Flowers v. Torrence Mem'l Hosp. Ctr.*, 884 P.2d 142, 145 (Cal. 1994)). The statute lists some instances of neglect in the relevant context, for example "[f]ailure to assist in personal hygiene, or in the provision of food, clothing, or shelter," or "[f]ailure to provide medical care for physical and mental health needs." Welf. & Inst. Code § 15610.57(b)(1-2). Many of the cases in California considering the question of neglect involve **elder** patients who have been left alone long enough that they develop bed sores or other infections from unclean wounds. [18]

Reckless neglect occurs when someone deliberately disregards a high degree of probability that injury will occur. As *Delaney* clarified, the difference between "reckless neglect" and "medical malpractice" is one of degree. 971 P.2d at 990. In *Mack v. Soung*, the court described the conduct that is sufficient to allege recklessness:

> Recklessness refers to a subjective state of culpability greater than simple negligence, which has been described as a "deliberate disregard" of the high degree of probability that an injury will occur. Recklessness, unlike negligence, involves more than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others involved in it.

95 Cal. Rptr.2d 830, 835 (Ct. App. 2000) (citing *Delaney*, 971 P.2d at 990). Plaintiff's claim of neglect presumably falls under the "[f]ailure to provide medical care for physical and mental health needs" provision, Welf & Inst. Code § 15610.57(b)(2).

As plaintiff cannot show neglect, he certainly cannot show reckless neglect. If plaintiff's claim of neglect is based on the events surrounding the surgery, then this claim must be dismissed. Dr. Eisenberg, by operating on plaintiff's large hernia, did not fail to provide medical care. Discharging the plaintiff when he met the VA's discharge criteria, even though he was in pain, does not constitute neglect within the meaning of the statute. Plaintiff was given a Vicodin at 7:55, and then discharged with the appropriate instructions and prescriptions. At most, plaintiff alleges simple negligence, which does not rise to the level of neglect within the meaning of the statue.

If plaintiff's claim of neglect is related to the co-payment or eligibility disputes, this claim must also be dismissed. An administrative dispute about benefits does not amount to neglect as defined under the § 15610.57; even if the dispute had mistakenly led the VA to refuse to treat plaintiff, [19] the failure to provide medical treatment still would not constitute "neglect" as defined by the statute because the statue is aimed at protecting the **elderly** who have no recourse when their custodial guardians mistreat them. *Delaney*, 971 P.2d at 994. The VA's eligibility determinations simply do not fall within the ambit of the statute.

Finally, plaintiff's claim that the Palo Alto VA "refused to even admit Plaintiff" on February 20, 2010, does not establish "malice, oppression, fraud and recklessness" because it is undisputed that the VA was diverting all ambulances at the time plaintiff's ambulance was diverted. Compl. ¶16.

b. The VA did not engage in financial abuse of plaintiff

Plaintiff has also failed to state a claim under § 15610.30, which sets forth the definition of "financial **abuse**" of an **elder**. Financial **abuse** occurs when someone "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with the intent to defraud, or both." Welf & Inst. Code § 15610.30(a). Moreover, the defrauder must act in bad faith. Welf & Inst. Code § 15610.30(b) (person "knew or should have known that this conduct is likely to be harmful to the **elder**."). The majority of financial **elder abuse** cases before this Court generally have to do with predatory lending or sales practices. [20] Again, the government has found no cases where a court has found financial **abuse** of an **elder** in relation to benefit coverage. Rather financial **abuse**, as defined by § 15610.30, is meant to hold liable people who systematically work their way into **elder** people's lives by building a relationship of trust, and then exploit that relationship by wrongful dispossession.

The facts of the present case do not amount to financial **abuse**. Even if the VA has overcharged plaintiff for the disputed co-payments-a matter not appropriate for this court and currently being litigated before an administrative judge-the intent element of § 15610.30 is not satisfied. Plaintiff pleads conclusory allegations that the VA acted "with malice, oppression, fraud and recklessness," but offers no proof of such intent. Compl. ¶16. Plaintiff's one theory behind the intent is retaliation, a far-fetched theory unsupported by any evidence. Indeed, plaintiff testified that he does not have a theory behind why the VA would retaliate against him. Marsili Dep. 148:16-25. Further contradicting the allegation of retaliation is the fact that the VA corrected the mistake by April 2010. Ex. R. If plaintiff additionally alleges that the offsetting of his Social Security benefits amounts to financial **abuse**, this claim, too, must fail. The VA was not taking plaintiff's money for wrongful use or intent to defraud: the

VA withheld from plaintiff's Social Security checks because the plaintiff was not satisfying an outstanding debt. Ex. S. Even if the VA's billing records were erroneous and plaintiff did not owe the amount the VA believed he did, their actions did not amount to financial **abuse** because they were taken in good faith. Because the VA did not engage in financial **abuse**, plaintiff may not recover treble damages under California Civil Code § 3345.

V. CONCLUSION

Plaintiff's surgical malpractice claim is predicated on the unsupported factual assumption that testicular damage following open hernia repair surgery can only result from surgical error:
Q. You believe that Dr. Eisenberg. . . botched your surgery?

A. Correct.

Q. And you believe that because?

A. It's obvious.

Q. It's obvious to you because you lost a testicle?

A. Correct.

Q. And you believe that's not supposed to happen.

A. Correct.

Q. And because it happened, he must have done something wrong?

A. Correct.

Q. And that's what this lawsuit is about?

A. Correct.

Marsili Dep. 88:16-89:6.

However, it is undisputed that testicular damage is a small but inherent risk in all open surgery repairs. This risk was magnified in this case because of the size and location of the hernia and was disclosed to plaintiff in writing. Both Dr. Gardiner and Dr. Threatt agree that Dr. Eisenberg performed the open hernia repair surgery within the standard of care.

Given the weakness in their surgical malpractice claim, plaintiff will surely attempt to pursue a theory of premature discharge. However, there is no evidence in the record that a reasonably prudent physician would have diagnosed infarction at the time of discharge or, had such a diagnosis been made, would have been able to save plaintiff's dying testicle.

To obtain remedies that the FTCA does not authorize, including attorney's fees and punitive damages, plaintiff tacks on a claim of **elder abuse**. Even had plaintiff exhausted his administrative remedies, there are no facts that show that the VA neglected or financially **abused** plaintiff within the meaning of the California **elder abuse** statue.

For these reasons, defendant is entitled to summary judgment on all of plaintiff's claims. [21]

DATED: August 17, 2010

Respectfully submitted,

MELFNDA HAAG

United States Attorney

/S/ _____

JAMES A. SCHARF

Assistant United States Attorney

Attorney for Defendant

Footnotes

1 Defendant also moves to dismiss plaintiff's cause of action for **elder** **abuse** pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the grounds that plaintiff failed to exhaust his administrative remedies for this particular claim.

2 The complaint also identifies the Department of Veterans Affairs as a defendant. The sole proper defendant under the FTCA is the United States of America. 28 U.S.C. §§ 2674, 2679.

3 Excerpts from plaintiff's deposition transcript are attached to the Declaration of James A. Scharf ("Scharf Decl.") as Exhibit A.

4 All exhibits referenced in this Motion are attached to the Scharf Decl.

5 Plaintiff's wife died later on January 22, around 6 pm. Marsili Dep. 24:15. Her health had been declining for years. Plaintiff claims he does not remember very much from this day given the traumatic events that happened after the visit to the VA. *Id.* at 49:18-21. However, plaintiff also testified that the was able to make decisions on and around this day. For example, he had decided to proceed with the surgery. He was also capable of taking care of himself, driving, working, and engaging in activities of daily living. *Id.* at 63:1-64:22.

6 A complete copy of Dr. Threatt's deposition is attached to the Declaration of James A. Scharf as Exhibit B.

7 Plaintiff testified that he signed this document without reading it, and that he actually was experiencing pain at a level "11 ½" on a scale of 0-10, with 10 being the worst pain imaginable. Marsili Dep. 84:17-24. For the purposes of this Motion, we will assume plaintiff was experiencing pain at the time of discharge, which is to be expected following an open surgery repair. Gardiner Decl. ¶17; Threatt Dep. 79:13-24. Other than the patient's subjective rating of pain, there was no evidence of any significant, objective findings that would suggest complication. Gardiner Decl. ¶17.

8 Defendant believes plaintiff is also making an informed consent claim and thus addresses that issue as well.

9 Dr. Threatt testified that he believed the risk was so small that it need not be disclosed. Threatt Dep. 52:5-22.

10 Although plaintiff does not remember signing this form, he speculates that the VA falsified the document. Marsili Dep. 17:1-10; 50:9-25. He believes this to be the case because the signature, while his, is smaller than his normal signature, and theorizes that the VA transposed the signature from another document. *Id.* Such shrinkage of the signature is normal, however, because the VA uses an electronic signature pad for consent forms. The signature on the hernia surgery consent form is identical to the signature on the consent form for a different surgery in 2006. Ex. T. Plaintiff's failure to remember the signature is not surprising given that he testified that he never reads anything that he signs. Marsili Dep. 73:5-10. For example, plaintiff did not even read his answers to the interrogatories (prepared by his attorneys) before he signed the verification. Marsili Dep. 26:21-28:3; 72:2-3. Perhaps for this reason, he also "cannot recall the doctors ever explaining ... the risks and benefits" of any of the four surgeries he has had in his life, including the orchiectomy. *Id.* at 102:23-25.

11 Even if plaintiff had claimed that despite his signature, he was never properly informed of the risks of the surgery by a physician, California law follows the objective theory of contract: if one signs a contract, one is presumed to have read the contract and executed it. *May-Loo Music, Inc. v. Great*, 2008 WL 4297001, at *4 (C.D. Cal. Sept. 12, 2008).

12 Further, plaintiff has failed to exhaust his administrative remedies with regard to this claim. In *Goodman v. United States*, the Ninth Circuit addressed whether an administrative claim asserting medical negligence during surgery gave rise to sufficient notice of an informed consent claim. Agreeing with the Seventh Circuit, the court held that the plaintiff was required to at least allude to the issue of informed consent in the administrative claim: a claim asserting medical negligence did not inherently encompass informed consent. 298 F.3d 1048, 1056.

13 Neither Dr. Gardiner nor Dr. Threatt believe the compromise of blood was due to the plug and patch procedure, however, because Dr. Eisenberg's surgical notes state that he could fit his finger through the hole that he fashioned for the cord to go through.

14 The doctrine of res ipsa loquitur is inapplicable where, as here, a surgical complication can result absent negligence. *Siverson v. Webber*, 372 P.2d 97, 99-100 (Cal. 1962).

15 Dr. Threatt's opinion that the nurse discharged plaintiff prematurely is based on his feeling that "she did not do as good a job with managing his pain as she should have," not on the fact that he "had an obvious infarcted testicle that needed to be addressed." Threatt Dep. 70:7-12.

16 Plaintiff also claims that, under California Civil Code § 3345, he is entitled to treble the damages available under the **elder** **abuse** statute; § 3345 allows for the trebling, in certain cases of **elderly** persons, of fines or penalties authorized by statute. Civ. Code § 3345 (West 2010).

17 This decision was made based on an administrative error: plaintiff was listed has having served from 1950 to 1958, when in fact it should have been listed as 1953 to 1955. Ex. R. This mistake probably resulted from the fact that plaintiff was in the reserves from 1950-1953 and on active duty from 1955-1958. Marsili Dep. 135:11-12.

18 *See, e.g.*, *Country Villa Claremont Healthcare Ctr., Inc. v Super. Ct.*, 15 Cal. Rptr. 3d 315 (Ct. App. 2004).

19 Other than his diversion to Sequoia Hospital on Feb. 20 2009, plaintiff has never been refused medical treatment by the VA. Marsili Dep. at 137:10-13.

20 *See, e.g., Kennedy v. Jackson Nat'l Life Ins. Co.*, 2010 U.S. Dist. LEXIS 63604 (June 23, 2010); *Quintero Family Trust v. Onewest Bank, F.S.B.*, 2010 U.S. Dist. LEXIS 63659 (June 25, 2010).

21 Although defendant is entitled to summary judgment, plaintiff may be able to obtain compensation for the loss of his testicle by renewing his claim for disability benefits pursuant to 38 U.S.C. § 1151. Similarly, the dismissal with prejudice of this lawsuit would not affect his pending administrative litigation regarding the co-payment dispute.

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